

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT and LICENSE NO. 500 108
Issued to: Sverre SORENSON Z-161 202

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2216

Sverre SORENSEN

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 26 April 1979, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland, admonished Appellant upon finding him guilty of negligence. The specification found proved alleged that while serving as pilot on board the SS CHANCELLORSVILLE under authority of the captioned documents, on or about 9 December 1978, Appellant failed to navigate with caution in the vicinity of Courthouse Point, Maryland, thereby resulting in said vessel running around.

The hearing was held at Baltimore, Maryland, on 24, 25 January, and 8, 14 and 15 February 1979.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and five documents.

In defense, Appellant offered i evidence the testimony of two witnesses and five documents, as well as a sworn Affidavit of Appellant.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant admonishing Appellant for his negligent navigation of the SS CHACELLORSVILLE.

The entire decision was served on 27 April 1979. Appeal was timely filed on 24 May 1979 and perfected on 12 December 1979.

FINDINGS OF FACT

On 9 December 1978, Appellant was serving as Pilot on board

the SS CHACELLORSVILLE and acting under authority of his license while the vessel was underway approaching Courthouse Point, Maryland, on the waters of Upper Chesapeake Bay. CHANCELLORSVILLE is 568.8 feet long and drew 8 feet 2 inches forward and 19 feet 4 inches aft on the day in question. On 9 December 1978, the vessel was enroute to Philadelphia from Baltimore via the Chesapeake & Delaware Canal. Vessel maneuvering data, as well as weather and tidal conditions, were ascertained prior to the Baltimore departure. Both of the vessel's radar sets were in operation and functioning normally, as was the ship's fathometer.

At 0817 the vessel was steady on the Courthouse Range on a course of 074 degrees true at half ahead, which resulted in a speed through the water of 10.2 knots and over the ground of approximately 8 knots. Visibility was fair to poor due to intermittent rain. A lookout was posted in the bow.

At about 0819 Appellant noted a heavy rain squall ahead, and a check of the radar indicated it would not provide navigational information in the vicinity of the squall. Shortly thereafter Appellant requested the third mate, John W. SELBERG, to step into the chart room to verify the next course. Appellant to go in the chart room topoint out the channel which he wanted checked. The helmsman, Joseph BADARWEICZ, overheard the request, including Appellant's statement that the new course should be about 048 or 049.

The bend approached by the vessel would normally be marked by buoys; however, during ice season many are removed--a fact of which Appellant was aware. While the third mate was in the chart room, Appellant ordered 10 degrees left rudder. The helmsman responded and executed the command. During the turn an ebb tide in excess of one knot and a heavy west wind were both opposing the vessel's turn. As a result of these forces Appellant anticipated a slow turn. During the turn a heavy squall reduced visibility to near zero. The third mate returned to the bridge and confirmed that 048 degrees true was the proper course. The helmsman overheard the report, which Appellant acknowledged by nodding his head. Appellant never ordered the helmsman to steady up on a particular heading.

After a short span of time Appellant discerned a vaguely defined land mass ahead of the vessel and was prompted thereby to ask the helmsman his present heading. The helmsman responded that the vessel was passing 030 degrees true. Appellant, fearing an error on the part of the helmsman, stepped to the gyrocompass and verified the report. He ordered hard right rudder and engines ahead full at 0825. The vessel responded by swinging to starboard momentarily before she grounded ad was held fast. At 0826 CHANNCELLORSVILLE was hard aground north and east of Buoy 17,

approximately 150 yards outside the Back Creek Channel in 9 feet of water.

No death, personal injury, property damage, or pollution resulted from the grounding.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

- I A presumption of negligence does not apply in this case due to extreme circumstances;
- II The Administrative Law Judge erred in finding that incomplete orders to the helm contributed to the negligence; and,
- III The charge should not be sustained when based on an investigation which was tainted by alleged improprieties on the part of the Investigating Officer.

APPEARANCE: Semmes, Bowen & Semmes, ESq., of Baltimore,
Marylant, by James Bartless, III, Esq.,

OPINION

I

A rebuttable presumption or inference of negligence arises when a grounding occurs in shoal water which is clearly designated on navigational charts. The burden of rebutting the presumption falls on the person charged. Decision on Appeal No. 2034, aff'd NTSB Order EM-57; Decision on Appeal Nos. 2133 and 1565.

It is true that mere error of judgement is not negligence. But error of judgement as distinguished from negligence is an action or omission which reasonable men would differ over. Negligence, as defined at 46 CFR 5.05-20, presumes an act a reasonably prudent person would not commit under the same circumstances or an omitted act which a reasonably prudent person would fail to perform. Decision on Appeal No. 1940.

No issue is take with Appellant's order to the helm to execute a 10 degree left rudder turn. However, it was correct for the Administrative Law Judge to conclude that a reasonably prudent person under the same circumstances (limited visibility, restricted waters, etc.) would not fail to direct the helmsman to take up a new course, or at the least, closely monitor the swing of the

vessel. Thus, the circumstances of this case are clearly distinguishable from those in Universe Tankships, Inc. v. United States, 337 F. Supp. 282 (E.D.Pa. 1972).

The Investigating Officer bore his burden of proof by demonstrating that a grounding occurred and that Appellant failed properly to direct the course of the vessel. No evidence of record contradicts these two basic facts. If Appellant rebutted the presumption of negligence it was to no avail, as these two elements are sufficient in themselves to found the decision of the Administrative Law Judge. Absence of some channel buoys, adverse weather, and low visibility were not the cause of the grounding herein. It was the misdirection of the vessel. If Appellant had properly directed the helmsman to take up a new course, and still run aground, Universe Tankships might well be applicable and no negligence proved, but that is not the case here.

II

Appellant issued an order to the helmsman to alter the course of CHANCELLORSVILLE at 0823 but issued no further order until he was aware that the next course to be followed was to the right of the vessel's heading at 0825. The issue presented is not whether Appellant was justified in anticipating a slow turn due to external forces acting on the vessel. The issue is whether under the circumstances a reasonably prudent pilot would have failed to issue a specific course to be followed or more adequately monitored the vessel's progress in the turn. The specific finding of negligence by the Administrative Law Judge was addressed to this latter issue. In the circumstances or record, i.e., low visibility, inadequate navigational data and a partially marked channel, such a conclusion was proper. In fact, given these circumstances, Appellant should have been more cautious if he expected a slow turn, monitoring the turn closely to judge whether the rate of turn was so slow as to present a danger of grounding on the right side of the channel as he proceeded northeast.

Under the circumstances I find that the evidence supports the conclusion that Appellant was negligent in his failure to order a specific course change, or in the alternative, to monitor the progress of the vessel through the turn.

III

Suspension and revocation proceedings may be instituted by an investigating officer as a result of any investigation, whether conducted under 46 CFR Part 4 or Part 5. 46 CFR 5.01-30(a). Thus, the Investigating Officer committed no impropriety in serving a charge sheet upon Appellant at the termination of their first

interview. In any event, production of licenses in connection with the interview was not prejudicial to Appellant.

Neither is it improper for an Investigating Officer to obtain statements in the course of an investigation. This is not affected in the least by the subsequent decision of the officer to subpoena the same individuals as witnesses in a suspension and revocation hearing. The facts presented support the conclusion of the Administrative Law Judge that the alleged improprieties occurred during a Part 4 casualty investigation. There would be no bar to parallel investigations of an event under the distinct mechanisms of 46 CFR Parts 4 and 5. Indeed, the chronology of events, as presented by Appellant, tend to demonstrate that the indicia of the investigations were kept separate from one another though both proceeded during the same span of time. The fact that the witnesses' statements were introduced by Appellant himself further supports this conclusion.

Assuming, arguendo, that the alleged improprieties occurred, further discussion may be of value. The watch officer and helmsman have not been heard to complain of their treatment by the Investigating Officer, and Appellant's analogy to the criminal law exclusionary rule would carry the suggestion that Appellant lacks standing to raise this issue. Appellant was certainly accorded his full rights in the proceeding before the Administrative Law Judge, and prior decisions clearly hold that such proceedings are procedurally distinct from the pre-hearing investigations. Decision on Appeal No. 2158.

The alleged impropriety concerning threats of criminal prosecution is not what it would appear at first blush. Appellant's affidavit and the written closing argument by the Investigating Officer are in substantial agreement. They indicate that Appellant was advised of the potential effect of ignoring a subpoena related to a casualty investigation and the enforcement mechanisms available. It does not appear that any overt threats of criminal prosecution were made. Such notice, in the face of counsel's advice that Appellant would not appear in response to the subpoena, was not improper.

CONCLUSION

I find the charge and specification of negligence are proved by substantial evidence of a reliable and probative character in the record. The Administrative Law Judge correctly applied the controlling principles of law in arriving at his well-reasoned decision.

ORDER

The order of the Administrative Law Judge dated at Baltimore, Maryland, on 26 April 1979, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 29th day of May 1980.

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